Bank of Commerce (M) Bhd v Selangor Frits & Glazes Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING UP NO D3–28–481 OF 1996 (3)
ARIFIN JAKA J
30 OCTOBER 1998

Companies and Corporations — *Winding up — Disputed debt — Petitioner demanded interest from date after auction commenced to date of receipt of auction's proceeds — Whether respondent's liability to settle judgment debt ceased on the date of auction sale*

The respondent entered into a loan agreement and a supplemental agreement ('the loan agreements') with the petitioner and several other banks. Pursuant to the loan agreements, the respondent was granted various loan facilities. One of the security for the loan facilities was a third party charge over a land in favour of the petitioner. As at 29 March 1993, the respondent owed the petitioner the sum of RM3,349,672.66, in which the petitioner demanded the said sum with interest from March 1993 until full payment. Upon failure of the respondent to pay, a civil suit was filed by the petitioner against them, in which a judgment in default of appearance ('the judgment') was obtained for the sum claimed.

Prior to the judgment, the petitioner had also filed foreclosure proceedings for an order that the said land be sold by public auction to satisfy the debt as due at 29 March 1993. Order for sale was obtained and the debt due, inclusive of interest amounting to RM4,176,369.70, was paid out of the proceeds of the sale only on 16 May 1996. The petitioner then claimed, by way of a notice of demand, the sum of RM502,276.81, being the interest on the debt due for the period from 27 April 1995 (date immediately after the auction) to 16 May 1996 (date of receipt of the amount due from the proceeds of the auction). The respondent's failure to give a positive respond to the demand led to the petitoner filing this winding-up petition. The question that arose was whether the respondent's liability to settle the judgment debt ceased on the date of the auction sale.

Held, allowing the application and ordering that the company be wound up:

(1) Since the petitioner's claim in the instant case was based on a judgment and not on the order for sale in the foreclosure proceedings, the petitioner was entitled to claim the arrears of interests from the date of sale to the date when the sum was finally received by them. Since the petitioner could only use the money from the date he received payment, it was unjust and unequitable to deprive the petitioner of the interest which they claimed. The judgment sum was only satisfied when the petitioners received the money and that such amount should include the accrued interest as stated in the judgment up to that date being the date of final payment or realization (see p 102A–B).

(2) The company had not complied with the notice of demand and no payment had been made. In addition, there was no evidence to support that the company was able to settle its debts due to it. On the other hand, there was evidence to show that the company has been dormant for a few years. The company did not adduce any evidence at all to show or even to suggest they were solvent. The excess money did not belong to the company, and should be released to the chargor. As such, the company was found to be unable to pay the debt and is insolvent (see p 102C–E).

[Bahasa Malaysia summary

Penentang telah memasuki satu perjanjian pinjaman dan satu perjanjian tambahan ('perjanjian-perjanjian pinjaman') dengan penentang dan beberapa bank yang lain. Berdasarkan perjanjian-perjanjian pinjaman tersebut, penentang telah diberikan beberapa kemudahan pinjaman. Salah satu jaminan bagi kemudahan-kemudahan pinjaman tersebut adalah cagaran pihak ketiga ke atas tanah yang mana pempetisyen mempunyai hak ke atasnya. Pada 29 Mac 1993, penentang telah berhutang dengan pempetisyen sebanyak RM3,349,672.66, di mana pempetisyen telah menuntut jumlah tersebut bersama faedah daripada Mac 1993 hingga pembayaran penuh. Atas kegagalan penentang untuk membayar, satu tindakan sivil telah difailkan oleh pempetisyen terhadap mereka dan satu penghakiman ingkar ketidakhadiran ('penghakiman tersebut') telah didapati bagi jumlah tersebut.

Sebelum penghakiman tersebut, pempetisyen telah pun memfailkan prosiding perampasan bagi mendapat perintah agar tanah tersebut dijual di lelongan awam bagi menyelesaikankan hutang yang belum berbayar dan terkumpul sehingga 29 Mac 1993. Perintah penjualan telah didapati dan hutang yang belum dibayar itu, termasuk faedah, berjumlah RM4,176,369.70, telah dibayar daripada hasil jualan tersebut hanya pada 16 Mei 1996. Pempetisyen kemudiannya telah menuntut, melalui notis tuntutan, sejumlah RM502,276.81, yang merupakan faedah bagi hutang yang belum berbayar dari 27 April 1995 (tarikh sebaik sahaja selepas lelongan awam tersebut) hingga 16 Mei 1996 (tarikh penerimaan pembayaran hutang hasil daripada jualan lelongan tersebut). Kegagalan penentang untuk memberi jawapan yang positif terhadap tuntutan pempetisyen itu, membawa kepada pempetisyen memfailkan petisyen penggulungan ini. Persoalan yan timbul ialah sama ada liabiliti penentang untuk menyelesaikan hutangnya tamat pada tarikh lelongan awam tersebut.

Diputuskan, membenarkan permohonan dan memerintah bahawa syarikat tersebut digulung:

(1) Memandangkan tuntutan pempetisyen di dalam kes ini adalah berdasarkan satu penghakiman dan bukannya perintah jualan tersebut, pempetisyen adalah berhak menuntut tunggakan faedah dari tarikh penjualan sehingga tarikh apabila jumlah tersebut

akhirnya diterima oleh mereka. Oleh kerana pempetisyen hanya boleh menggunakan wang daripada tarikh dia menerima pembayaran, ia adalah tidak adil untuk tidak membenarkan tuntutan faedah pempetisyen. Jumlah penghakiman hanya diselesaikan apabila pempetisyen menerima wang tersebut dan jumlah yang diterima itu hendaklah termasuk faedah yang tertunggak seperti mana yang dinyatakan di dalam penghakiman sehingga tarikh pembayaran akhir atau penyelesaian (lihat ms 102A–B).

(2) Syarikat tersebut tidak mematuhi notis tuntutan dan tiada pembayaran dibuat. Sebagai tambahan, tiada bukti yang mengatakan syarikat tersebut mampu membayar hutang-hutangnya. Sebaliknya, terdapat bukti yang menunjukkan bahawa syarikat tersebut telah dorman untuk beberapa tahun. Syarikat tersebut juga tidak memberi sebarang bukti yang menunjukkan atau mencadangkan yang mereka ini adalah solven. Wang tersebut yang berlebihan bukan dimiliki oleh syarikat tersebut, dan sepatutnya diberi kepada penggadai. Oleh itu, syarikat tersebut didapati tidak mampu membayar hutang tersebut dan adalah tak solven (lihat ms 102C–E).]

Notes

For cases on disputed debts, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 651–653.

Cases referred to

Aman v Southern Railway Co [1926] 1 KB 59 (distd)
American International Assurance Co Ltd v Union Builders (M) Sdn Bhd [1993] 1 MLJ 95 (not folld)
Kandiah Peter v Public Bank Bhd [1994] 1 MLJ 119 (folld)
Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd [1988] 1 MLJ 257 (refd)

Legislation referred to

Companies Act 1965 s 218
National Land Code 1965 s 254

KL Wong (*Nik Hussain & Partners*) for the petitioner.
B Thangaraj (*Thangaraj & Associates*) for the respondent.

Arifin Jaka J: This is a petition presented on 20 December 1996 by Bank of Commerce (M) Bhd ('the petitioner'), a licensed local commercial bank formerly known as United Asian Bank Bhd, for the winding up by the court under the provision of the Companies Act 1965 ('the Act') of Selangor Frits & Glazes Sdn Bhd ('the company'), on the ground that the company was unable to pay its debts and that it was just and equitable that the company should be wound up.

A The facts are straight forward and are not really disputed. The petitioner sued the company in Shah Alam High Court vide Suit No 22–298–93 ('the civil suit') based on a loan agreement dated 28 November 1990 and a supplemental agreement dated 28 January 1992 ('the loan agreements') executed between the company as the borrower and the petitioner as the manager and agent, and the several banks ('the co-lenders') B that appear in the first schedule to the loan agreements. Pursuant to the loan agreements, the company was granted by the co-lenders a syndicated loan facility in the maximum aggregate principal sum of RM18,200,000 made up of a term loan facility of up to a maximum principal sum of RM15,000,000 and diverse banking and credit facilities of up to a C maximum principal sum of RM3,200,000 or as additional working capital. One of the securities for the loan facilities was a third party charge in favour of the petitioner over a property held under HS (D) 54826, PT No 15637, Mukim Petaling registered in the name of Kenanga Sari (M) Sdn Bhd ('the said land').

As at 29 March 1993, the company owed the petitioner the sum of D RM3,349,672.66. By a letter dated 11 May 1993, the petitioner through its solicitors to the company demanded for payment of the said sum of RM3,349,672.66 with interests as stipulated in the loan agreements from 30 March 1993 until full payment. The company had failed to pay the said sum or any sum at all. On 10 June 1993, the petitioner filed the civil suit in E the Shah Alam High Court for the recovery of the said sum. A judgment in default of appearance ('the judgment') dated 27 July 1993 was entered against the company whereby the defendant 'hendaklah membayar kepada plaintif jumlah sebanyak RM3,349,672.66 di bawah kemudahan pinjaman berkala (term loan)'. The company did not set aside the judgment.

The petitioner had also filed, on 17 June 1993, foreclosure proceedings F vide Saman Pemula No 24–424–93 against Kenanga Sari (M) Sdn Bhd, also in the High Court at Shah Alam for an order that the said land be sold by public auction to realize the sum of RM3,349,672.66 then due as at 29 March 1993. The order for sale by public auction of the said land was obtained by the petitioner on 10 March 1994 in the foreclosure G proceedings. Pursuant to the order, the said land was sold by a public auction which was held on 26 April 1995 for a price of RM8,402,000. The petitioner rendered a statement of account as at 26 April 1995 stating the total amount due inclusive of interest was RM4,176,369.70 (exh R10 in encl 9). This amount was paid to the petitioner out of the proceeds of sale of the said land only on 16 May 1996. The petitioner claims the sum of H RM502,276.81 being the interest on the judgment sum for the period from 27 April 1995 (date immediately after the auction) to 16 May 1996 (date of receipt of the amount due from the proceeds of auction). This is the amount claimed by the petitioner in the notice of demand pursuant to s 218 of the Act. The notice of demand was served on the company on 20 November 1996. The company not only did not respond to the demand I but had neglected to pay or secure or compound to the reasonable satisfaction of the petitioner, the said sum as demanded within 21 days from the date of service of the demand. The petitioner filed this petition on 20 December 1996.

On 4 March 1997, the company filed a notice of motion praying, inter alia, that the petition be struck off or alternatively that the petition be stayed. The application was withdrawn. Both parties agreed that the affidavit in support of the application (encl 9) be treated as an affidavit in opposition to the petition. The company opposed the petition solely on the ground that the amount claimed by the petitioner was not a debt owed by the company to the petitioner. It is not in dispute that the petitioner was paid the sum of RM4,176,369.70 being the amount due as at 26 April 1995 that is the date of sale, and this amount is the amount due under the order for sale and the judgment as at that date. The question that arises is whether the company's liability to settle the judgment debt ceased on the date of the auction sale.

Learned counsel for the company submitted that as the amount due under the charge and the judgment as at date of sale of the land was the same, settlement of one will extinguish the petitioner's right under the other. It was also contended that the cut-off point of the company's liability under the judgment and the loan agreements was the date of the auction sale, that is 26 April 1995. It follows therefore that the petitioner cannot claim any additional interest on the judgment as all the debt owed by the company to the petitioner had been settled on that date.

Learned counsel relied on the case of *American International Assurance Co Ltd v Union Builders (M) Sdn Bhd* [1973] 1 MLJ 95 for the proposition that the cut-off point of the company's liability was the date of the auction sale. That case dealt with the question of interest on the sum due in a foreclosure proceeding. In that case, the chargees of certain lands on the security whereof the chargor was granted a loan bearing interest at 11% pa instituted a foreclosure proceeding when the chargor defaulted in payment of a number of instalments as well as interest. Due notice of default was given as in Form 16D under s 254 of the National Land Code 1965 ('the NLC'). The chargee sought to recover the sum of RM1,401,596.24 due as on 31 August 1970, together with interest at the agreed rate of 11% pa from 1 September 1970 to the date of payment or realization. An order was made by the High Court that the charged lands be sold by public auction to recover the said sum together with interest thereon at 11% pa from 1 September 1970 to the date of the order and further interest thereafter at 6% pa to date of payment or realization. The chargees appealed against that order in so far as it relates to the payment of interest at 6% from date of order. The chargees maintained that they were entitled to claim full interest at 11% pa until date of realization. The then Federal Court allowed the appeal and held that as the appellant's (chargee's) claim was not on a covenant but in exercise of their statutory right under the NLC against the chargor in default, there could not be any merger in the judgment and the chargees were therefore entitled to interest at the agreed rate, that is 11% until realization of the security.

Ong CJ (Malaya) referred to s 268 of the NLC and said at p 96:

> It may also be observed that s 268 provides for priorities in the application of the proceeds of sale, first towards land rent, secondly expenses connected with the sale and then as follows:

A (c) Thirdly, in the payment to the chargee of the total amount due under the charge at the time of sale.

His Lordship further opined that the words 'total amount due under the charge at the time of sale' indicate that interest continues to accrue at the agreed rate until sale.

B Therefore, what the case decides is that the chargee is entitled to payment inclusive of interest at the agreed rate up to date of sale. I am of the view that it is not authority for the proposition that the chargee is not enabled to payment of interest under a separate judgment obtained by the chargee based on the loan agreement.

C Learned counsel also referred to *Aman v Southern Railway Co* [1926] 1 KB 59 to support his contention that the amount claimed by the petitioner is not sustainable, as payment from the proceeds of the sale has extinguished the petitioner's claim for the interest. In my opinion, *Aman*'s case is clearly distinguishable from the facts of the present case. There, the plaintiff's claim was founded on a judgment which had been assigned to D him. The judgment was against a railway company for arrears of interest on some of its debenture stock. The said debenture stock with arrears of interest thereon was purchased by the plaintiff who also took an assignment of the debt. Pursuant to an absorption scheme under the Railways Act 1921, the railway in question was absorbed in and its liabilities were transferred to the defendant railway company. It was also in accordance E with the absorption scheme that stock of the defendant railway company was allocated to the plaintiff in lieu of the stock of the absorbed company held by them 'in substitution for the stock of the (absorbed) company held by them and in satisfaction of all claims there under including any arrears of interest'.

F It is clear therefore the issue in that case concerns the payment of arrears of interest with limitations which was expressly stated in a statute. In the instant case, the issue is on the interest on a judgment which is not subject to any limitation in any statute. For this reason, *Aman*'s case is distinguishable on the facts and does not apply to the present case.

G It is trite that an order for sale pursuant to s 256 of the NLC is not a judgment (see *Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd* [1988] 1 MLJ 257).

In *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119 at p 122, where Eusoff Chin SCJ (as his Lordship then was) in explaining the nature of an order for sale in foreclosure proceedings said:

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> A chargee who makes an application for an order for sale in foreclosure proceedings under s 256 of the Code does not commence an action. He merely enforces his right as a chargee by exercising his statutory remedy against the chargor in default. The chargee, therefore, does not sue for a debt. It is also clear that his claim for an order for sale is not based upon a covenant but under the registered charge. The order for sale when made under s 256 of I the Code is not a judgment or a decree. The court hearing the application for foreclosure does not make, and in any event ought not to make, any adjudication upon any substantive issue.

Applying the principles enunciated in the above two cases, I am of the opinion that since the petitioner's claim in the instant case is based on a judgment and not on the order for sale in the foreclosure proceedings, the petitioner is entitled to claim the arrears of interests from the date of sale to the date when the sum was finally received by them. The petitioner could only use the money from the date he received payment. For this reason, it is unjust and inequitable to deprive the petitioner of the interests which they claimed. I rule that the judgment sum is only satisfied when the petitioners received the money and that such amount should include the accrued interest as stated in the judgment up to that date being the date of final payment or realization. My judgment is therefore that the respondent owed the petitioner the sum of RM 502,276.81 as stated in the notice of demand.

The final question I have to decide is whether the company is deemed unable to pay its debt. It is not disputed that the company had not complied with the notice of demand and no payment has been made. In addition, there is no evidence to support that the company is able to settle its debts due to the company. On the other hand, there is evidence to show that the company has been dormant for a few years. The company did not adduce any evidence at all to show or even to suggest they are solvent. They only say that the amount realized from the proceeds of sale is almost double the amount claimed by the petitioner. The excess money does not belong to the company. It should be released to the chargor. It is my finding that the company is unable to pay the debt and it is insolvent.

In the above premises, I make an order that the company be wound up under the provision of the Act, the official receiver is appointed as a provisional liquidator and costs of the petition be paid out of the assets of the company to be taxed.

Application allowed.

Reported by Mohd Rizal Abidin